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IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1982

THE PEOPLE OF THE STATE OF MICHIGAN,
Petitioner,

VS.

DAVID KERK LONG,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MICHIGAN

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TABLE OF CONTENTS

	Page No.
INDEX OF AUTHORITIES	ii
QUESTIONS PRESENTED	iii
OPINIONS BELOW	1
STATEMENT OF JURISDICTION	1
CONSTITUTIONAL PROVISIONS INVOLVED	2
STATEMENT OF FACTS	2
REASONS FOR GRANTING THE WRIT	5
CONCLUSION	7
APPENDIX "A" (Michigan Supreme Court Opinion)	8
APPENDIX "B" (Michigan Court of Appeals Opinion)	35

INDEX OF AUTHORITIES

Cases: Page No.

Canal Zone v Bender, 573 F2d 1329 (CA 4, 1978) 5

Michigan v Thomas, ... US .... (United States Supreme Court #81-593, reported at 31 CrL 4103, 1982) 6, 7

People v Long, 94 Mich App 338; 288 NW2d 629 (1979) .. 1, 7

People v Moore, 391 Mich 426; 216 NW2d 770 (1974) .. 5

South Dakota v Opperman, 428 US 364; 96 S Ct 3092; 49 L Ed 2 889 (1968) 6, 7

Terry v Ohio, 392 US 1; 88 S Ct 1868; 20 L Ed 2d 889 (1968) 5, 6, 7

United States v Powless, 546 F2d 792 (CA 8, 1977) cert den 430 US 910; 97 S Ct 1185; 51 L Ed 2d 588 (1977) .. 5

United States v Rainone, 586 F2d 1132 (CA 7, 1978), cert den 440 US 980; 99 S Ct 1781; 60 L Ed 2d 239 (1979) .. 5

United States v Ross; .... US ....; 102 S Ct ....; 72 L Ed 2d 572 (1982) 6, 7

Wong Sun v United States, 371 US 471; 83 S Ct 407; 9 L Ed 2d 441 (1963) 5

Other Authorities:

MCL 333.7403(2)(d); MSA 14.15(7403)(b)(4) 4

Mich Const 1963, art 1, § 11 ..... 2, 5

28 USC 1257(3) 1

US Const Am IV 2, 5, 6

QUESTIONS PRESENTED

I.

WHETHER POLICE OFFICERS AT A TRAFFIC STOP ACTED UNREASONABLY UNDER TERRY v OHIO AND US CONST, AM IV IN LIFTING THE FRONT SEAT CENTER ARMREST OF DEFENDANT'S CAR TO INVESTIGATE THE "LEATHER" ARTICLE PROTRUDING THEREUNDER (VISIBLE FROM OUTSIDE THE CAR), AFTER THEY SEIZED A FOLDING HUNTING KNIFE FROM THE CAR FLOORBOARD (VISIBLE FROM OUTSIDE THE CAR) AND THE POLICE ARE CONTINUING THEIR INVESTIGATION TO DETERMINE IF THE DISORIENTED DEFENDANT WILL BE PERMITTED TO RE-ENTER THE VEHICLE TO OBTAIN THE VEHICLE REGISTRATION OR WHETHER THE DEFENDANT WILL BE ARRESTED?

II.

WHETHER THE SEIZURE OF 75 LBS. OF MARIJUANA FROM THE TRUNK OF DEFENDANT'S IMPOUNDED CAR FOLLOWING HIS ARREST VIOLATED SOUTH DAKOTA v OPPERMAN OR WAS THE "FRUIT" OF THE ILLEGAL ARMREST "SEARCH" PER WONG SUN v UNITED STATES?

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NOW COME the People of the State of Michigan by their attorneys FRANK J. KELLEY, Attorney General; Louis J. Caruso, Solicitor General; and Leonard J. Malinowski, Assistant Attorney General; and prays that a writ of certiorari issue to review the judgment of the Supreme Court of the State of Michigan entered in the above entitled cause on June 14, 1982.

OPINIONS BELOW

The opinion of the Michigan Supreme Court is reported at .... Mich ....; .... NW2d .... (1982) and is appended as Appendix A. The Michigan Court of Appeals' opinion is reported at *People* v *Long*, 94 Mich App 338; 288 NW2d 629 (1979), appended as Appendix B.

STATEMENT OF JURISDICTION

The opinion of the Michigan Supreme Court was issued June 14, 1982, and the jurisdiction of this court is invoked under 28 USC 1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

Amendment IV of the United States Constitution reads:

> The right of the People to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Art 1, § 11 of the Michigan Constitution, 1963 reads:

> The person, houses, papers and possessions of every person shall be secure from unreasonable searches and seizures. No warrant to search any place or to seize any person or things shall issue without describing them, nor without probable cause, supported by oath or affirmation. The provisions of this section shall not be construed to bar from evidence in any criminal proceedings any narcotic drug, firearm, bomb, explosive or any other dangerous weapon, seized by a peace officer outside the curtilage of any dwelling house in this state.

STATEMENT OF FACTS

Shortly after 12 midnight of August 24-25, 1977, Barry County Sheriff deputies pursued a speeding car. The speeding car stopped with its front end in a roadside ditch and the car sitting broadside on the highway. David Long, the driver and sole occupant, got out of the vehicle leaving the car door open and approached the two deputies who asked Long for identification. Defendant Long gave no response. One deputy repeated the request and Long silently produced his driver's license. The deputy asked Long for his vehicle registration; Defendant Long gave no response. The deputy repeated his

request and Long wordlessly turned and walked back towards his open car. The deputies formed an opinion that Long "appeared to be under the influence of something," and that "open intox" might be in the car. (Preliminary Exam Tr, pp 4-6, 19-20; R, pp 127-131, 181).

Following Long back to the opened door of Long's car, both deputies saw, by the light from the opened door, a folded hunting knife (4" blade, 9" knife when extended) on the floorboard of the driver's side of the car. Standing outside the car, one deputy seized the knife while the other deputy frisked Long for further weapons, producing none. (Preliminary Exam Tr, pp 6, 48-49; R, pp 131-132, 167).

One deputy shined his flashlight into the front seat area specifically to look for more weapons before letting Long re-enter the vehicle to produce a vehicle registration. The deputies were aware of the danger they faced and the need for further investigation. (Preliminary Exam Tr, pp 6, 24-29, 34-35, 48-49). The deputy saw a leather-like object protruding from under the folded down center armrest of the front seat. Kneeling on the front seat, the deputy flipped the center armrest up and saw a leather pouch big enough to hold another weapon. Before touching the pouch, the deputy saw a plastic baggie extending out from the pouch, containing a grass-like substance that looked like marijuana. The deputy took the pouch outside the car and both deputies believed the grass was marijuana. The pouch also contained other suspected drugs. (Preliminary Exam Tr, pp 6-8, 29-30; R, pp 133-139, 155-159).

Defendant Long was arrested for possession of marijuana. The deputy searched the interior of defendant's car and found a car title in the glove box but no vehicle registration. (Preliminary Exam Tr, p 8; R, p 140).

The deputies then impounded defendant Long's car. Defendant Long had no car trunk key. The car trunk lock was missing. Before calling the tow truck, a deputy inserted his pocket-knife in the trunk lock hole and lifted the trunk lid to find two large bags which were torn, revealing their contents. The bags contained 75 pounds of marijuana. (Preliminary Exam Tr, pp 9-14; R, pp 140-144).

The validity of the armrest search and the subsequent trunk search following defendant's arrest was raised by argument during defendant's preliminary examination on September 22, 1977, (Preliminary Exam Tr, pp 11-13). The district judge's written opinion of December 23, 1977, upheld the armrest search as proper protective search and the trunk search as a valid inventory search and as a search incident to defendant's valid arrest. Defendant filed a pretrial motion to suppress and to quash based on the invalidity of the searches; this motion was denied by the circuit judge at the April 28, 1979, pretrial hearing. The circuit judge, on independent review, found the armrest and truck searches reasonable as valid protection and proper inventory. Defendant again raised the search issue during trial by a motion to reconsider the denial of suppression (R-77-79), and the trial judge denied reconsideration as unwarranted, holding both searches reasonable and distinquishable from the state and federal case cited by defendant (R-117-119). Towards the close of the prosecution's case, defendant again sought exclusion of the tendered marijuana sample-exhibits as the fruit of the unreasonable auto searches (R-189-191). After argument, the trial judge again ruled the auto searches were valid protection and proper inventory (R-193-194).

Defendant was convicted of possession of marijuana [MCL 333.7403(2)(d); MSA 14.15(7403)(b)(4)], and the Michigan Court of Appeals, 94 Mich App 338; 288 NW2d 629 (1979) affirmed the conviction, holding both the armrest search valid

under *Terry* v *Ohio*, 392 US 1; 88 S Ct 1868; 20 L Ed 2d 889 (1968), and the inventory trunk search valid under *South Dakota* v *Opperman*, 428 US 364; 96 S Ct 3092; 49 L Ed 2d 1000 (1976) and the US Const, Am IV. The Michigan Supreme Court reversed citing US Const, Am IV and Mich Const 1963, art 1, § 11, and holding that *Terry, supra* did not authorize a protective search of an area, and that the trunk search was an illegal "fruit" of an invalid arrest per *Wong Sun* v *United States*, 371 US 471; 83 S Ct 407; 9 L Ed 2d 441 (1963). The dissenting chief justice would affirm the armrest search as proper protection, and the trunk search as proper inventory. Another justice, partially dissenting, would affirm the armrest search as proper protection, but would reverse the inventory trunk search as invalid.

REASONS FOR GRANTING THE WRIT

The Michigan Supreme Court's decision relied on *Terry* v *Ohio* and US Const, Am IV and merely cited the Mich Const 1963, art 1, § 11. The Michigan Supreme Court has interpreted Mich Const 1963, art 1, § 11 as being neither more nor less restrictive than US Const, Am IV concerning "any narcotic drug, firearm, bomb, explosive or any other dangerous weapon, seized by a peace officer outside the curtilage of any dwelling house in this state." Mich Const 1963, art 1, § 11; *People* v *Moore*, 391 Mich 426; 216 NW2d 770 (1974). The Michigan Supreme Court relied exclusively on *Terry* v *Ohio, supra*, and one federal case to reverse the Michigan Court of Appeals. The lower federal courts have split on the scope of the *Terry* "stop and frisk" to include an area frisk, *e.g.* no area frisk, *Canal Zone* v *Bender*, 573 F2d 1329 (CA 4, 1978); area frisk allowed, *United States* v *Rainone*, 586 F2d 1132 (CA 7, 1978), cert den 440 US 980; 99 S Ct 1781; 60 L Ed 2d 239 (1979); *United States* v *Powless*, 546 F2d 792 (CA 8, 1977) cert den 430 US 910;

97 S Ct 1185; 51 L Ed 2d 588 (1977). This conflict, in an important area of constitutional interpretation, should be settled by the United States Supreme Court.

Given the recent reaffirmation of the limited expectation of privacy regarding automobiles and any containers therein by *United States* v *Ross*, —— US ——; 102 S Ct ——; 72 L Ed 2d 572 (1982), and given that *Terry* did not limit itself by explicit terms to personal frisks alone, and given that *Terry* has justified the stopping of automobiles, and given the *Terry* rationale of balancing the necessary protection due to investigating police with the limited intrusion of a citizen's Fourth Amendment rights occasioned by police conducting a justified investigation, the lifting of the driver's armrest in this case to investigate the leather object visible from outside the immobilized car (after one weapon had already been seized from the car), before letting defendant re-enter the car to get his vehicle registration therefrom, was not a violation of *Terry* v *Ohio* or of US Const, Am IV. Lifting the armrest to look at the visible object under it after finding a hunting knife on the car floor is no more intrusive than frisking a bump in a person's clothing during an investigation of a criminal suspect believed to be armed. Petitioner believes that the Michigan Supreme Court's decision in this case is in conflict with the *Terry v Ohio* protective frisk rationale, and the US Const, Am IV and those lower federal and state cases that uphold a limited automobile frisk under the *Terry* rationale.

The dissenting chief justice of the Michigan Supreme Court found that the inventory trunk search of the impounded car did not violate *South Dakota* v *Opperman, supra;* see also *Michigan* v *Thomas*, —— US —— (United States Supreme Court #81-593, reported at 31 CrL 4103, 1982), and *United States* v *Ross, supra.*

The limited frisk of the car leading to defendant's probable cause arrest for possession of marijuana present under the armrest could justify the police belief that they could search the entire car including the trunk, *United States* v *Ross, supra*. Even without probable cause to search the trunk, the police validly arrested the defendant-driver and impounded the car. Pursuant to their caretaking duty, the police conducted a valid inventory search of the car trunk to secure its contents, because the driver who was the sole occupant of the car was precluded from driving the car himself. Cf. *South Dakota* v *Opperman, supra; Michigan* v *Thomas, supra; People* v *Long*, 94 Mich App 338; 288 NW2d 629 (1979).

CONCLUSION

Petitioner submits that the decision of the Michigan Supreme Court conflicts with *Terry* v *Ohio, supra*, and US Const, Am IV so that plenary review should be granted.